IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RETAIL BRAND ALLIANCE, INC.,	:	**CIVIL ACTION**
	:	
Plaintiff,	:	**NO. 06-01857**
	:	
v.	:	
	:	
ROCKVALE OUTLET CENTER, LP	:	
	:	
Defendant.	:	

MEMORANDUM AND ORDER

Stengel, J. **January 31, 2007**

This breach of contract dispute arises from renovations to a retail space in a shopping center. After unsuccessfully moving to dismiss plaintiff's claim, defendant brought a counterclaim against the plaintiff and added a third-party defendant. Plaintiff now moves to dismiss counts one, two, and three of defendant's counterclaim. For the reasons described below, I will grant plaintiff's motion.

I. BACKGROUND[1]

Plaintiff Retail Brand Alliance entered into a written lease agreement with Defendant Rockvale Outlet Center on October 25, 2004 whereby Rockvale agreed to rent RBA space in the Rockvale Square Outlets for RBA to operate a Casual Corner Store. The term of the lease was five years. The lease, however, permitted the tenant, RBA, to assign the lease with the landlord Rockvale's consent.

[1]The facts are taken from defendant's counterclaim and are accepted as true for the purposes of this motion.

When the parties entered into the lease, the store was an empty "shell." Both RBA and Rockvale had respective duties, outlined by the Lease, to turn that "shell" into a retail store. As the landlord, Rockvale was obligated to turn the "shell" into a "vanilla box," which would consist of the basic features and layout of a store, according to the terms outlined in the Lease and an addendum titled the Casual Corner Annex Landlord's Work Addendum, "Landlord's Work Addendum." Under the Landlord's Work Addendum, Rockvale was to provide RBA with a concrete floor, a storage area, demising walls, front doors, several interior partitions, bathrooms, and a suspended ceiling. Then RBA would "fit out" the space as the Casual Corner Annex store. Section 21.10 of the Lease provided that Rockvale would pay RBA an Improvement Allowance ("Allowance") totaling $340,000 to fit out the space.[2]

Before Rockvale could begin construction of the vanilla box, the Landlord's Work Addendum and Section 21.22(b) of the Lease required RBA to provide detailed architectural plans and specifications describing the construction work that both parties would perform to fulfill their duties under the Lease to Rockvale. RBA was required to provide store design plans to Rockvale eight weeks prior to RBA's construction start date. RBA supplied plans prepared by Cowan and Associates,[3] "Cowan," its architecture firm.

Rockvale followed theses plans in performing its work. In early 2005, Rockvale

[2] Rockvale never paid the Allowance to RBA. RBA filed to suit to recover this amount.

[3] Cowan is now a third-party defendant in this case. Cowan has not moved to dismiss the one count of the counterclaim that pertains to it.

began performing the construction work required by the lease and shortly thereafter, discovered the plans contained "latent defects, errors, omissions and inaccuracies and were false and misleading." Countercl. ¶ 29. The defects included design defects in the walls that failed to comply with building and fire codes. If followed, these defects would have created a serious safety danger. Building code officials discovered the defects, issued a stop work order, and required that the wall and ceiling assembly be redesigned to comply with building and fire codes.

Rockvale hired another architect to correct Cowan's design errors at a substantial additional cost of nearly $100,000.[4] The defective plans supplied by Rockvale and RBA also delayed construction. Since the store did not open on time, Rockvale suffered additional damages by not realizing percentage rent during this time period.

The store opened for business in May 2005. In fall 2005, RBA began exploring the possibility of assigning its lease to Charming Shoppes, Inc. On January 15, 2006, RBA, Rockvale, and Charming executed an Agreement for Assignment and Assumption of Lease.

Section 7 of the Assignment Agreement is entitled "Estoppel"[5] and states that as of

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[4] It does not appear from the record that Defendant sought to collect any damages for these excess renovation costs prior to filing the counterclaim.

[5] Section 7 (vi) states that the "Landlord [Rockvale] has not received any written notice from Assignor [RBA] of any monetary or non-monetary default under the Lease by Landlord that remains uncured." Yet, RBA did request reimbursement of the Allowance before the assignment and Rockale had not paid this claim when the parties executed the Assignment Agreement. Compl. ¶¶ 15-18. The court notes this discrepancy. However, in its motion to dismiss, Rockvale did not argue that RBA was estopped from claiming this allowance based on this section of the agreement.

the date of the assignment, Rockvale "certifies and represents and warrants, to the best of Landlord's knowledge, information and belief, as follows, and Landlord is hereby estopped from asserting claims or defense to the contrary." Pl's Mot. Dismiss Ex. A. Section 7 "Estoppel." Rockvale certified under the estoppel clause that "the rents, other charges and payments provided for in the Lease have been paid" in full, id. at (iii), and "there are no uncured defaults by Assignor [RBA] of any covenant, agreement, term, provision or condition contained in the Lease and there are no events which with notice or lapse of time, or both, would reasonably be expected to result in a default by Assignor under the Lease, " id. at (v).

RBA filed a complaint on May 3, 2006 to recover the Allowance and amended its complaint on July 6, 2006. Rockvale filed motions to dismiss the case on June 23, 2006 and July 26, 2006, arguing that RBA assigned its interest in the Allowance to Charming when it executed the Assignment Agreement. The court found this reading contrary to the plain language of the Assignment Agreement and denied Rockvale's motion to dismiss. See Retail Brand Alliance, Inc. v. Rockvale Outlet Ctr., LP, No. 06-1857, 2006 U.S. Dist. LEXIS 78683 (E.D. Pa. Oct. 26, 2006). Rockvale answered RBA's complaint on November 6, 2006 and added a counterclaim against RBA and Cowan as a third-party defendant. Rockvale's counterclaim against RBA includes three counts: (1) breach of the Lease agreement; (2) negligent misrepresentation; (3) a set-off based on counts 1 and 2 for any damages payable to RBA based on the claims in its amended complaint.

Rockvale also asserted a third-party claim against Cowan for negligent misrepresentation in count 4. Plaintiff moved to dismiss the counterclaim on December 18, 2006. Cowan answered the counterclaim on January 22, 2007 and has not moved to dismiss Rockvale's claims against it.

II. STANDARD FOR MOTION TO DISMISS

Courts use the same standard in ruling on a motion to dismiss a counterclaim under Federal Rule of Civil Procedure 12(b)(6) as they do for a complaint. United States v. Union Gas Co., 743 F. Supp. 1144, 1150 (E.D. Pa. 1990). The purpose of a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure is to test the legal sufficiency of a complaint. Sturm v. Clark, 835 F.2d 1009, 1011 (3d Cir. 1987). The court may grant a motion to dismiss only where "it appears beyond a reasonable doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." Carino v. Stefan, 376 F.3d 156, 159 (3d Cir. 2004) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). In deciding a motion to dismiss, the court must construe the complaint liberally, accept all factual allegations in the complaint as true, and draw all reasonable inferences in favor of the plaintiff. Id. See also D.P. Enters. v. Bucks County Cmty. Coll., 725 F.2d 943, 944 (3d Cir. 1984). A plaintiff, however, must plead specific factual allegations. Neither "bald assertions" nor "vague and conclusory allegations" are accepted as true. See Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997); Sterling v. Southeastern Pa. Transp. Auth., 897 F. Supp. 893 (E.D. Pa. 1995).

Courts can resolve contract disputes on a motion to dismiss "if the claims under which the plaintiff seeks relief are barred by the unambiguous terms of a contract attached to the pleading, because the interpretation of an unambiguous contract is a matter of law for the court." Jaskey Finance & Leasing v. Display Data Corp., 564 F. Supp. 160, 163 (E.D. Pa. 1983).

Substantive state law governs this dispute since this court has diversity jurisdiction. See Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). To ascertain Pennsylvania law, this court must look to the decisions of the Pennsylvania Supreme Court and other lower state courts. Royal Indem. Co. v. Sec. Guards, Inc., 255 F. Supp. 2d 497, 501 (E.D. Pa. 2003).

III. DISCUSSION

A. Rockvale's certification in Section 7 of the Assignment Agreement estops it from asserting a counterclaim against RBA.

RBA bases its motion to dismiss on the "estoppel certification" in Section 7 of the Assignment Agreement, whereby Rockvale represented that there were no uncured defaults by RBA as of the date of the assignment. An estoppel certificate is "a signed statement by a party (such as a tenant or mortgagee) certifying for another's benefit that certain facts are correct, as that a lease exists, that there are no defaults, and that rent is paid to a certain date." K's Merch. Mart, Inc. v. Northgate L.P., 835 N.E.2d 965, 971 (Ill. App. Ct. 2005) (citing BLACK'S LAW DICTIONARY 572 (7th ed. 1999)). These certificates

are widely used in commercial real estate transactions. Id. The primary purpose behind these statements is to estop the party making the statement from later raising claims "of which it knew or should have known at the time the certificate was executed." Id. at 971-72. Pennsylvania courts enforce estoppel certificates according to their terms. Liberty Prop. Trust v. Day-Timers, Inc., 815 A.2d 1045 (Pa. Super. Ct. 2003) (finding a "Tenant Estoppel Certificate" equitably estopped a tenant from later asserting that there had been an oral modification to the lease).

This specific doctrine is derived from the more general rule of equitable estoppel, which "prevents one from doing an act differently than the manner in which another was induced by word or deed to expect." Kreutzer v. Monterey County Herald Co., 747 A.2d 358, 361 (Pa. 2000). To show estoppel requires proof that one's intentional or negligent conduct induced another to believe certain facts and the other rightfully relied and acted on the belief and will be prejudiced if the former is allowed to deny the existence of these facts. Liberty Prop. Trust, 815 A.2d at 1052 (citing Zitelli v. Dermatology Educ. & Research Found., 633 A.2d 134, 139 (1993)). Like any contract provision, if the estoppel clause is unambiguous, the court must interpret it according to its plain language. Mellon Bank v. Aetna Bus. Credit, Inc., 619 F.2d 1001,1009 (3d Cir. 1980).

Through the estoppel certification, Rockvale expressly represented that as of January 15, 2006, there were no "uncured defaults" attributable to RBA under the lease or conditions that "would reasonably be expected to result in a default" by RBA. Pl's Mot.

Dismiss Ex. A Section 7 (v). Excess renovation costs incurred by Rockvale in converting the retail space from an empty shell to a vanilla box would have been incurred sometime before the store opened in May 2005. These costs predated the assignment by almost a year. The estoppel certification in the Assignment Agreement bars Rockvale from attempting to collect these expenses now, since it represented that there no uncured defaults by RBA when executing the assignment.

Rockvale does not contest the plain meaning of estoppel certification. Instead, Rockvale argues its counterclaim is not barred because the estoppel clause is invalid and unenforceable for two reasons: (1) RBA fraudulently induced Rockvale to enter this agreement and (2) the Assignment Agreement is unenforceable due to unilateral mistake. I find these arguments unconvincing.

(1) Fraudulent inducement

It is a basic contract law principle that parties will not be bound to the terms of a contract procured by illegality, unconscionability, fraud, duress, or mistake. Mellon Bank, 619 F.2d at1009. Accordingly, estoppel certificates should not be enforced if the party "can show a defense to the making of the document, such as fraud or duress...". JRK Franklin, LLC v. 164 E. 87th St. LLC, 812 N.Y.S.2d 506, 507 (N.Y. App. Div. 2006).

Rockvale asserts that RBA fraudulently inducted it into making the estoppel certification through RBA's unspoken suggestions that it would not pursue payment for

the Allowance if Rockvale consented to the assignment of the lease. To support this theory, Rockvale describes a discussion between its general partner, David Ober, and an unnamed RBA representative, during a Penn State football game on September 5, 2005. Def's Mem. Opp'n Mot. Dismiss Countercl. p. 10. The RBA representative told Ober that RBA was closing and liquidating its Casual Corner stores and would therefore "dump" its lease with Rockvale. Ober told the RBA representative that Rockvale stopped payment on RBA's Allowance check in light of RBA's decision to pull out of a five-year lease after a short period of time. Rockvale argues that "[w]ell aware of Rockvale's reasons for stopping payment, RBA did not protest the decision" and in the following months "RBA never mentioned the [Allowance] again until well after it had secured Rockvale's consent to the assignment." Id. Rockvale argues that through this silence, "RBA deliberately mislead Rockvale into believing that it agreed that based on the planned early departure and in return for Rockvale's consent to an eventual assignment, the [Allowance] was not payable." Id. Rockvale concludes that since RBA procured the estoppel certification through fraud, Rockvale should not be estopped from its claims related to the renovation and should be allowed to develop a factual record to support this claim.

(a) Judicial estoppel

Before exploring the legal insufficiency of Rockvale's fraud argument, the court notes that Rockvale's argument violates the principle of judicial estoppel. This doctrine

prevents litigants from playing "fast and loose with the courts" by assuming "inconsistent or mutually contradictory positions with respect to the same matter in the same or a successive series of suits." Scarano v. Central R. Co., 203 F.2d 510, 513 (3d Cir. 1953); see also New Hampshire v. Maine, 532 U.S. 742, 750-751 (2001) (setting forth factors to apply the doctrine). In bringing its previous motion to dismiss, Rockvale argued that RBA's claim to the Allowance was barred by the Assignment Agreement. When it was advantageous, Rockvale argued that the Assignment Agreement was valid and any interest in the Allowance had passed to Charming, the assignee. Now, Rockvale takes a completely inconsistent position that the Agreement is invalid because it was procured by fraud. This tactic is an "affront to judicial dignity." Scarano, 203 F.2d at 513. Rockvale should not obtain an unfair advantage from advancing inconsistent theories--challenging the validity of the Assignment Agreement now when it previously used the Agreement as a shield against liability.

(b) Parol evidence bar

RBA argues that Rockvale's claim of fraudulent inducement must be dismissed because the only evidence of this claim–RBA's unspoken agreement to not pursue the Allowance in return for Rockvale's consent to the assignment–is barred by the parol evidence rule.

The parol evidence rule bars prior or contemporaneous oral representations or agreements about a subject that is specifically dealt with in a written contract that covers

the entire agreement of the parties, absent fraud, accident or mistake. 1726 Cherry St. P'ship v. Bell Atlantic Properties, 653 A.2d 663, 666 (Pa. Super. Ct. 1995) appeal denied 664 A.2d 976 (Pa. 1995) (citing Bardwell v. Willis Co., 100 A.2d 102, 104 (Pa. 1953)) . In Pennsylvania, parol evidence is only permitted to show "fraud in the execution" and not "fraud in the inducement." 1726 Cherry St. P'ship, 653 A.2d at 666; Dayhoff Inc. v. H.J. Heinz Co., 86 F.3d 1287, 1300 (3d Cir. 1996); Hart v. Arnold, 884 A.2d 316, 340 (Pa. Super. Ct. 2005) (finding that fraud-in-inducement claims are barred unless the party alleges that the representations were fraudulently, accidentally, or mistakenly omitted from the integrated written contract."). Fraud in the execution is defined as "evidence of representations concerning a subject dealt with in an integrated written agreement and made prior to or contemporaneous with the execution of the agreement to modify or avoid the terms of that agreement *only where it is alleged that the parties agreed that those representations would be included in the written agreement but were omitted by fraud, accident or mistake*." 1726 Cherry St. P'ship, 653 A.2d at 666 (emphasis added). Fraud in the inducement occurs when "the party proffering evidence of additional prior representations does not contend that the parties agreed that the additional representations would be in the written agreement, but rather claims that the representations were fraudulently made and that but for them, he or she never would have entered into the agreement." Id.

The Assignment Agreement is integrated[6] and therefore this court cannot consider extrinsic evidence unless the evidence fits into an exception to the parol evidence rule. Rockvale proffers the alleged unspoken understanding between the parties to show that it was induced by these representation to execute the assignment. Rockvale's evidence is barred by the parol evidence rule because it cannot point to any agreement between the parties that this understanding would be included in the Assignment Agreement. In other words, there is no evidence that the parties agreed that RBA's understanding that it would forgo the Allowance claim if Rockvale consented to the assignment would be included in the written agreement but were omitted by fraud, accident, or mistake. Rockvale's counterclaim is barred by the parol evidence rule because it alleges fraud in the inducement and not fraud in the execution.

(c) Ratification

Alternatively, Rockvale is barred from arguing the assignment is invalid based on RBA's fraudulent inducement because it has ratified the Assignment Agreement through its conduct over the past year. Fraudulent inducement is a path to avoid a contract if two elements are present: (1) "the other party knowingly made an affirmative misrepresentation or concealed a fact" and (2) the party wanting to avoid the contract "must show that he reasonably relied on the misrepresentation in entering the contract."

[6] Section 11 of the Assignment Agreement states that "[t]his Agreement constitutes the entire agreement between the parties hereto with respect to the subject matter hereof and supersedes any and all prior contemporaneous agreements and understandings between them relating to the subject matter hereof."

Seal v. Riverside Fed. Sav. Bank, 825 F. Supp. 686, 695 (E.D. Pa. 1993). Establishing fraud in the inducement does not render the transaction void but only voidable. Associated Hardware Supply Co. v. Big Wheel Distributing Co., 355 F.2d 114, 120-121 (3d Cir. 1965). The defrauded party can ratify the contract if "it accepts the benefits flowing from it, or remains silent, or acquiesces in the contract for any considerable length of time after the party has the opportunity to annul or avoid the contract." Wahsner v. American Motors Sales Corp., 597 F. Supp. 991, 998 (E.D. Pa. 1984); see also Stimson v. Stimson, 29 A.2d 679, 681 (Pa. 1943) (fraudulently induced contract is valid unless the defrauded party rescinds within a reasonable time); Peoples Mortgage Co. v. Federal Nat'l Mortgage Ass'n, 856 F. Supp. 910, 922 (E.D. Pa. 1994) (waiting over a year after an agreement is signed until litigation commences constitutes ratification.).

Even if RBA fraudulently induced Rockvale into consenting to the Assignment Agreement, Rockvale cannot use this alleged fraud to argue that the Assignment, including the estoppel certificate it executed, is invalid and unenforceable. Rockvale waiting almost one year after executing the Assignment Agreement in January 2006 to challenge its validity. Moreoever, as noted above, Rockvale has previously argued to this court that the Agreement is enforceable. Rockvale has consistently accepted the benefits of the Agreement by treating Charming, the assignee, as a tenant and accepting rent payments. Rockvale cannot argue fraud at this junction because by acquiescing to the

Assignment Agreement over the past year, Rockvale has ratified the agreement.[7]

(2) Unilateral mistake

In Pennsylvania, if parties enter into a contract upon a "mutual mistake as to an essential fact which formed the inducement" to the contract, the contract can be rescinded. Vrabel v. Scholler, 85 A.2d 858, 860 (Pa. 1952). Not every mutual mistake enables a party to avoid the contract–the mistake must be "of its essence, the *sine qua non* of the contract." Id.

The grounds for reforming a contract based on unilateral mistake are much narrower. Generally, courts do not grant relief when the mistake is unilateral, instead of mutual, and is not due to the fault of the other party. Warren v. Greenfield, 595 A.2d 1308, 1313 (Pa. Super. Ct. 1991); Cobaugh v. Klick-Lewis, Inc., 561 A.2d 1248, 1251 (Pa. Super. Ct. 1989). This follows the general contract law principle that parties should be bound by their agreements. 595 A.2d at 1813 n.4. Pennsylvania follows the Restatement view concerning unilateral mistakes. According to the Section 153 of the RESTATEMENT (SECOND) OF CONTRACTS:

> Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake under the rule stated in § 154, and (a) the effect of the mistake is such that enforcement of the contract would be unconscionable, or (b) the other party had reason to know of the mistake or his

[7] While Pennsylvania law dictates that a party cannot rescind a fraudulently induced contract after it has been affirmed, it does permit the defrauded party to recover damages for the fraud. Scaife Co. v. Rockwell-Standard Corp., 446 Pa. 280, 289 (Pa. 1971).

fault caused the mistake." RESTATEMENT (SECOND) OF CONTRACTS § 153 (1981). This standard sets forth two basic elements required for a court to find a unilateral mistake. First, the mistake must be to a "basic assumption" or the essence of the contract. Vrabel v. Scholler, 85 A.2d 858, 860 (Pa. 1952). Second, the party alleging the mistake must not bear the risk of the mistake by being aware, at the time the contract is made, that the party has "limited knowledge" of the facts to which the mistake relates and treating this limited knowledge as sufficient. RESTATEMENT (SECOND) OF CONTRACTS § 154(b) (1981).

Once a party has established the basic elements of a unilateral mistake, there are two exceptions to the general rule that a party must live with the result of the unilateral mistake. First, a unilateral mistake as to the contract can invalidate an agreement procured through fraud. In re Nelson Co., 959 F.2d 1260, 1268 (3d Cir. 1992) (citing Rusiski v. Pribonic, 515 A.2d 507, 511 (Pa. 1986)). Second, a contract based on unilateral mistake can also be rescinded "if the other party knows or has reason to know of the unilateral mistake, and the mistake, as well as the actual intent of the parties is clearly shown...." Lanci v. Metropolitan Ins. Co., 564 A.2d 972, 974 (Pa. Super. Ct. 1989); see also Lapio v. Robbins, 729 A.2d 1229, 1234 (Pa. Super. Ct. 1999).

It is doubtful whether Rockvale can establish the core elements of unilateral mistake. First, the mistake concerns payment of renovation costs. This mistake does not go to a "basic assumption" of the Assignment Agreement–to assign the lease to a new

tenant. Second, Rockvale bore the risk of its mistake by treating its limited knowledge as sufficient. Whitehill v. Matthews, 40 Pa. D. & C.4th 58, 71 (Pa. C.P. 1998). Rockvale "believed" that RBA shared its believe that the Allowance was not due based on RBA's desired to assign the lease. Def's Memo. Opp'n Mot. Dismiss Countercl. p. 14. Rockvale, a sophisticated corporation, did not request clarification or memorialize this "agreement" in writing and therefore bore the risk of this mistake.

Assuming Rockvale could establish the elements of unilateral mistake, it cannot show that it falls into one of the two narrow exceptions outlined above. Rockvale does not allege that RBA procured the assignment through fraud. Rockvale advances a theory of unilateral mistake--that RBA knew or should have been aware of Rockvale's mistaken assumption that the parties had agreed that Rockvale would consent to the assignment if RBA would forgo the allowance and cites Lanci in support.

Lanci is distinguishable because the mistaken plaintiff presented clear and convincing evidence that the defendant knew or should have known about plaintiff's mistaken belief. In Lanci, the plaintiff agreed to settle a claim arising from an automobile accident for $15,000 because the defendant represented that this was the policy limit. 564 A.2d at 974. The plaintiff in Lanci memorialized this understanding about a basic assumption of the contract in a letter accepting defendant's settlement offer. Id. When the plaintiff later found out that the policy had a limit of $250,000, the court allowed the plaintiff to void the contract because defendant "knew, or should have known, that Lanci

accepted the terms of this settlement offer under the mistaken belief that it was the limit of his coverage." Id. at 975.

In this case, Rockvale puts forth no evidence that RBA's silence concerning payment of the Allowance is the same as knowing that Rockvale was mistaken about a basic assumption of the contract. Even though the court must be lenient in construing factual assertions in a motion to dismiss, Rockvale's assertion that RBA was aware of its unilateral mistake is the kind of "vague and conclusory allegations" the court does not have to accept as true for the purposes of this motion. See Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997); Sterling v. Southeastern Pa. Transp. Auth., 897 F. Supp. 893 (E.D. Pa. 1995).

B. Rockvale's negligent misrepresentation claims

Rockvale is estopped from asserting any claims against RBA due to the estoppel certification in the Assignment Agreement, therefore, Rockvale's negligent misrepresentation claims also fails. Additionally, these claims will fail for the reasons described below.

Count II of Rockvale's counterclaim is for negligent misrepresenation against RBA. This arises from RBA's duty under the contract to provide accurate architectural plans in order for Rockvale to renovate the empty shell into a vanilla box. Count III of the counterclaim is for recoupment and arises from RBA's breach of its "contractual duty

to Rockvale by providing defective, false and misleading plans and specifications...". Countercl.¶ 63.

Counts II and III arise from RBA's contractual duty. In another example of Rockvale trying to play "fast and loose" with the court, Rockvale's memorandum opposing the motion to dismiss recharacterizes these claims as arising from RBA's fraudulent inducement of Rockvale to enter into a long-term lease. This is not an accurate assertion. The allocation of responsibilities for renovating the retail space was a term of a contract–not an inducement to enter into the contract. These claims are based in contract –not tort–and are simply another way of arguing that RBA breached a term of its Lease.

(1) Gist of the action doctrine

The "gist of the action" doctrine precludes plaintiffs from recasting an ordinary breach of contract claim as a tort claim. See e.g., Bohler-Uddeholm Am., Inc. v. Ellwood Group, Inc., 247 F.3d 79, 104 (3d Cir. 2001) (citing Bash v. Bell Tel. Co., 601 A.2d 825, 830 (Pa. Super. Ct. 1992)); eToll, Inc. v. Elias/Savion Adver., Inc., 811 A.2d 10, 14 (Pa. Super. Ct. 2002); Redev. Auth. of Cambria Co. v. Int'l Ins. Co., 685 A.2d 581, 590 (Pa. Super. Ct. 1996); Phico Inc. Co. v. Presbyterian Med. Servs. Corp., 663 A.2d 753, 757 (Pa. Super Ct. 1995).[8] The doctrine bars tort claims: (1) arising solely from a contract

[8] The Pennsylvania intermediate state courts have adopted this doctrine but it has not been accepted or rejected by the Pennsylvania Supreme Court. However, the Pennsylvania Superior Court and several federal courts have predicted that the Pennsylvania Supreme Court would adopt the doctrine were the issue presented before it. See, e.g., eToll, Inc. v. Elias/Savion Adver., Inc., 811 A.2d 10, 14 (Pa. Super. Ct. 2002); Bash, 601 A.2d at 829–30; Williams v. Hilton Group, PLC, 93 Fed. Appx. 384, 385 (3d Cir. 2004) (not precedential); Air Prods. and Chems., Inc. v. Eaton Metal, 256 F. Supp. 2d 329, 340 (E.D. Pa. 2003). When a state's highest court has not decided an

between the parties; (2) where the duties allegedly breached were created and grounded in the contract itself; (3) where the liability stems from a contract; or (4) where the tort claim essentially duplicates a breach of contract claim or the success of which is wholly dependent on the terms of a contract. eToll, Inc., 811 A.2d at 19 (internal quotations and citations omitted). The doctrine requires that the court examine the claim to determine "whether the 'gist' or gravamen of it sounds in contract or tort; a tort claim is maintainable only if the contract is 'collateral' to conduct that is primarily tortious." Sunquest Info. Sys. v. Dean Witter Reynolds, 40 F. Supp. 2d 644, 651 (W.D. Pa. 1999). A party should be limited to a contract claim "when the parties obligations are defined by the terms of the contracts, and not by the larger social policies embodied by the law of torts." eToll, 811 A.2d at 14-15 (citing Bohler-Uddeholm Am., Inc., v. Ellwood Group, Inc., 247 F.3d 79, 104 (3rd Cir. Pa. 2001), *cert. denied*, 534 U.S. 1162 (2002)).

The gist of the action doctrine bars claims for fraud in the performance of a contract. This is what is at issue here. eToll, 811 A.2d at 20. RBA had a contractual duty to provide accurate renovations plans to Rockvale. Any breach of this specific duty was defined by the parties' contract, not the social policy embodied by tort law.[9]

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issue, district courts may look to intermediate state appellate court decisions to assist in its prediction of how the state supreme court would rule. Paolella v. Browning-Ferris, Inc., 158 F.3d 183, 189 (3d Cir. 1998).

[9] Rockvale's argument that RBA had a separate social duty to provide adequate plans independent from the duties contained in the lease misconstrues the authority it relies on. GNC Franchising, Inc. v. O'Brien, 443 F. Supp. 2d 737, 744 (W.D. Pa. 2006) involved fraudulent claims that the plaintiff had made regarding the profitability of a Smoothie Bar to induce the defendant into entering the contract. Id. at 744. For this reason, the court decided to defer judgement as to whether the gist of the action doctrine barred the claim until later in the proceeding in order to definitively focus the facts. Id. at 749. Here, Rockvale has plead no facts to indicate the RBA fraudulently induced

While fradulent inducement has been held to be collateral to a contract and therefore not barred by the gist of the action doctrine, eToll, 811 A.2d at 17, this theory is not applicable here. Rockvale's claims of fradulent inducement are limited to the Assignment Agreement, see Section III.A. *supra*. The misrepresentation and recoupment costs of the counterclaim involve the alleged breach of RBA's duty to perform the contract–e.g. provide accurate renovation plans for Rockvale's work converting the empty shell to a vanilla box. These claims relate to the performance of the contract and therefore are barred by the gist of the action doctrine.

(2) Economic loss doctrine

Like the gist of the action doctrine, the Pennsylvania doctrine of economic loss is also designed to maintain the separate spheres of contract and tort law. New York State Elec. & Gas Corp. v. Westinghouse Elec. Corp., 564 A.2d 919, 925 (Pa. Super. Ct. 1989). Under this doctrine, a party cannot recover via a non-contract theory where the damages sought are economic ones under the parties' contract. Duquesne Light Co. v. Westinghouse Elec. Corp., 66 F.3d 604, 618 (3d Cir. 1995) (applying Pennsylvania law to note "the undesirable consequences of affording a tort remedy in addition to a contract-

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it to enter the initial lease by making false representations about the accuracy of its renovation plans. The GNC analysis is in accordance with the general rule that fraud in the inducement is not barred by the gist of the action doctrine. Additionally, Rockvale tries to show the breach of an independent social duty through the *Spearin* doctrine, formulated by the Supreme Court in United States v. Spearin, 248 U.S. 132, 136 (1918), which insulates a contractor from liability from the defects in building plans prepared by the owner. This theory seems completely irrelevant to the legal issues in this case and Rockvale's legal memorandum fails to cite authority establishing the doctrine is followed in Pennsylvania.

based recovery").

Rockvale misconstrues the Pennsylvania Supreme Court's recent pronouncement concerning the economic loss doctrine in Bilt-Rite Contractors, Inc. v. The Architectural Studio, 866 A.2d 270 (Pa. 2005). According to Rockvale, this case holds that "negligent representation claims are not barred by the economic loss doctrine." Def's Memo. Opp'n Mot. Dismiss Countercl. p. 17. This reading of Bilt-Rite is incorrect.

The issue in Bilt-Rite was whether a building contractor could maintain a negligent misrepresentation claim against an architect for misrepresentations in the architect's plans when there was no privity of contract between the architect and the contractor but the contractor reasonably relied upon the misrepresentations and suffered economic damages. Id. at 272. The court held that the economic loss rule does not bar recovery in the "architect/contractor scenario" because there was no privity requirement under the RESTATEMENT (SECOND) OF TORTS § 522, which establishes the duty owed to another when supplying information to the other for one's own monetary gain. Id. at 285-86. The court created a "narrowly tailored" ruling that "in cases where information is negligently supplied by one in the business of supplying information, such as an architect or design professional, and where it is foreseeable that the information will be used and relied upon by third persons, even if the third parties have no direct contractual relationship with the supplier of information" the party can pursue a negligent misrepresentation claim. Id. at 286-87. This narrow interpretation has been reinforced by lower Pennsylvania court's

when applying Bilt-Rite. See e.g., Carson/DePaul/Ramos v. Driscoll/Hunt, No. 02166, 2006 Phila. Ct. Com. Pl. LEXIS 278 (June 29, 2006); Nestle United States v. Wachovia Corp., No. 01026, 2006 Phila. Ct. Com. Pl. LEXIS 215 (May 11, 2006); Cutting Edge Sports, Inc. v. Bene-Marc, Inc., No. 01835, 2006 Phila. Ct. Com. Pl. LEXIS 212 (May 2, 2006); E.J. DeSeta, Inc. v. Goldner/Accord Ballpark, L.P., No. 02017, 2006 Phila. Ct. Com. Pl. LEXIS 4 (Jan. 10, 2006).

Bilt-Rite is completely inapplicable to this lawsuit. RBA is a corporation that operates retail stores; it is not an architect or design professional. RBA and Rockvale had a direct contractual relationship, unlike the parties in Bilt-Rite. Bilt-Rite's narrow exception, which allows a party to pursue a negligent misrepresentation tort claim without privity of contract, does not apply to Rockvale's counterclaim. Rockvale's negligent misrepresentation claims is also barred by the economic loss doctrine.

C. Negligent Misrepresentation against Cowan

Rockvale's counterclaim brings a negligent misrepresentation claim against Cowan, the architect. On January 22, 2007, Cowan answered Rockvale's complaint instead of moving to dismiss it. Therefore, count four of Rockvale's counterclaim against Cowan is not dismissed.

IV. CONCLUSION

For the reasons stated above, counts one, two, and three of Rockvale's counterclaim will be dismissed. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RETAIL BRAND ALLIANCE, INC.,	:	**CIVIL ACTION**
	:	
Plaintiff,	:	**NO. 06-01857**
	:	
v.	:	
	:	
ROCKVALE OUTLET CENTER, LP	:	
	:	
Defendant.	:	

ORDER

AND NOW, this 31st day of January, 2007, upon consideration of plaintiff's Motion to Dismiss Counterclaim (Document No. 31) and defendant's response thereto, it is hereby **ORDERED** that the motion is **GRANTED** as to counts one, two, and three of Rockvale's counterclaim. Count four against Cowan is not dismissed.

BY THE COURT:

/s/ Lawrence F. Stengel
LAWRENCE F. STENGEL, J.